APPEAL NO. 030264
FILED MARCH 26, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 15, 2003. The hearing officer determined that respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 12th quarter. Appellant (carrier) appealed the determinations related to good faith and ability to work and also contended that the hearing officer erred in excluding two reports. Claimant responded that the Appeals Panel should affirm the hearing officer's decision and order. Carrier did not appeal the direct result determination in claimant's favor and that determination has become final. Section 410.169.

DECISION

We reverse and remand.

Carrier contends the hearing officer erred in excluding Carrier's Exhibit Nos. 7 and 8, which were an undated medical report from Dr. B (new report) and a Work Status Report (TWCC-73) from that same doctor dated December 16, 2002. The claimant objected that these reports were not timely exchanged and said she had not seen them until the day before the hearing. Claimant asked for a continuance if the reports were to be admitted so that her doctor could review them and respond to them. Carrier stated that it was not opposed to a continuance for this purpose. The parties agreed with the hearing officer that it would be preferable to all not to continue the case, however. The hearing officer stated that he was "not sure" whether there was good cause for the late exchange. The hearing officer then stated that he was excluding the documents because they are not relevant to the qualifying period in dispute since the reports were written in December 2002 and the qualifying period for the 12th quarter ended on November 5, 2002.

The benefit review conference (BRC) took place on October 30, 2002. It appears undisputed that carrier had attempted to have claimant submit to a required medical examination (RME) with Dr. B two times in the fall of 2002, but the Texas Workers' Compensation Commission (Commission) had denied the requests. Dr. B finally examined claimant on December 16, 2002, which was after the 15-day exchange deadline. Carrier represented, and claimant confirms on appeal, that the request for an RME had been approved and the exam had been scheduled for December 9, 2002. However, claimant was unable to attend on that date because her mother had died and that was the date of her memorial service. Carrier stated that when Dr. B finally saw claimant in mid-December, Dr. B sent claimant for a functional capacity evaluation (FCE), which took place on December 19, 2002. Carrier asserts that it is unclear when Dr. B received the FCE report or when he wrote his new report, though it was written after the December 19, 2002, FCE and before carrier received it on January 13, 2002. Carrier represented that it received Dr. B's new report and the TWCC-73 report on

January 13, 2003, and sent a copy by overnight delivery to claimant. Claimant said she received the exchange on January 14, 2003, one day before the hearing.

The hearing officer's evidentiary rulings are reviewed using an abuse-of-discretion standard. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain a reversal of a judgment based upon the hearing officer's abuse of discretion in admitting evidence, an appellant must first show that the admission was in fact an abuse of discretion, and, also, that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

In a SIBs case involving an assertion that there was no ability to work during the filing period, the hearing officer must consider, among other things, whether "no other records show that the injured employee is able to return to work." *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 103.102(d)(4) (Rule 130.102(d)(4)). The Appeals Panel has stated that a hearing officer may consider records dated after the qualifying period in deciding this issue. *See* Texas Workers' Compensation Commission Appeal No. 992692, January 20, 2000. This does not mean that a hearing officer cannot consider the length of time between the "other record" and the SIBs period in question in deciding this issue, however. *See* Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999. The hearing officer may still decide whether the other record is credible regarding whether there was an ability to work during the filing period in question, although the hearing officer should articulate a reasonable basis for discounting the other record. *See* Texas Workers' Compensation Commission Appeal No. 010772, decided May 23, 2001. The Appeals Panel has indicated that a hearing officer may find that a report fails to show an ability to work if it erroneously states facts or is so conclusory as to fail to constitute a record. *See* Appeal No. 992197, *supra*. The hearing officer may also consider, for instance, whether the report takes into consideration the effects of claimant's medications and whether it addresses ability to work with regard to all of the compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 002091, decided October 23, 2000; Texas Workers' Compensation Commission Appeal No. 002853, decided January 24, 2001.

In this case, the hearing officer determined that the two excluded reports from Dr. B were not relevant to the qualifying period in dispute because the examination took place after the qualifying period ended. Because the Appeals Panel has said that reports written outside the qualifying period may be considered, we conclude that the hearing officer abused his discretion in excluding these reports. *See* Appeal No. 992692, *supra*. Further, after reviewing the record, we cannot conclude that such error was not reasonably calculated to cause and probably did not cause the rendition of an improper judgment. *See* Hernandez, *supra*. The excluded records were relevant to the issue of claimant's ability to work during the qualifying period in question. The hearing officer determined that carrier's other report from Dr. B dated March 23, 2002, did not constitute an "other record" showing that claimant was able to return to work. *See* Rule 130.102(d)(4). Therefore, it is possible that the excluded reports could affect the

outcome of the case, depending on whether they are admitted and what weight the hearing officer chooses to give to them. We conclude that the exclusion of this evidence constituted reversible error.

Carrier also contends that the hearing officer erred in determining that carrier did not have good cause for timely exchanging these two reports. However, the hearing officer did not make a determination regarding whether there was good cause for the lack of timely exchange in this case. Rule 142.13(c) requires that the parties exchange documentary evidence no later than 15 days after the BRC. Thereafter, parties shall exchange additional documentary evidence as it becomes available. Rule 142.13(c)(2). Untimely exchanged documents may be admitted on a showing of good cause. Rule 142.13(c)(3). On remand, the hearing officer should address the good cause issue.

In deciding the good cause issue, the hearing officer may consider, among other things, whether the party offering the evidence intentionally delayed the receipt of the document or had the document earlier than represented. *See* Appeal No. 991714, decided September 22, 1999. The hearing officer may also consider whether diligent efforts were made to obtain the report or document so that it might be exchanged as soon as possible. *See* Texas Workers' Compensation Commission Appeal No. 982687, December 31, 1998; Texas Workers' Compensation Commission Appeal No. 982422, decided November 30, 1998. Our standard of review for determining the appropriateness of the hearing officer's good cause finding is one of abuse of discretion. Appeal No. 92165, *supra*.

On remand, the hearing officer should make a determination regarding good cause for late exchange based on the record now before him. Should the hearing officer determine that carrier had good cause for the late exchange, the hearing officer may consider the two reports in question. We note that, at the hearing, carrier stated that it had no objection if claimant sought a continuance so that her doctor could review and respond to the two reports in question. If the hearing officer decides to admit the records upon a finding of good cause, the hearing officer should also consider whether claimant should be permitted to obtain a record from her doctor responding to the two reports in question. Given the fact that carrier had no objection in this regard, and because of the late exchange in this case, allowing claimant's doctor to respond to these reports would not be improper. *See generally* Texas Workers' Compensation Commission Appeal No. 93921, decided November 30, 1993.

Carrier also challenges the hearing officer's determinations regarding good faith and ability to work. Because we are remanding on evidentiary grounds, we must also reverse the hearing officer's determinations in Findings of Fact Nos. 6, 7, and 8 and Conclusion of Law No 3 and remand the case to the hearing officer for reconsideration of the good faith and SIBs entitlement issues.

In summary, on remand, the hearing officer should decide whether carrier had good cause for the late exchange. If there was no good cause, the records should not be considered. If the hearing officer determines that carrier did have good cause and

admits the records, the hearing officer should then consider whether claimant should be permitted to obtain a record from her doctor responding to the two reports in question. In remanding, we in no way intend to comment on whether there was good cause for the late exchange. We also do not intend in any way to comment on whether the hearing officer should discount the reports or their credibility should they be admitted on remand.

We reverse the hearing officer's decision and order and remand for further proceedings consistent with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

According to information provided by carrier, the true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

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Judy L. S. Barnes
Appeals Judge

CONCUR:

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Daniel R. Barry
Appeals Judge

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Elaine M. Chaney
Appeals Judge